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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KYLE HENELY, Defendant and Appellant.	D059627 (Super. Ct. No. SCE306136)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed as modified.

A jury convicted Kyle Henely of first degree burglary (Pen. Code,[1] §§ 459 & 460), unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)), grand theft (§ 487, subd. (a)), second degree burglary (§ 459), evading a police officer with reckless driving (Veh. Code, § 2800.2, subd. (a)), misdemeanor reckless driving (Veh. Code, § 23103, subd. (a)), and two traffic infractions. Henely admitted the out-on-bail enhancement

1 All further statutory references are to the Penal Code unless otherwise specified.

(§ 12022.1, subd. (b)). The trial court sentenced Henely to a determinate term of seven years, four months in prison.

Henely appeals, contending the trial court erred in denying his request for a continuance, on the day of trial, so that he could try to retain counsel and that the court erred in sentencing by failing to stay the sentences on certain counts under section 654,[2] and by imposing a consecutive term for count 2. We will reject each of Henely's contentions and affirm.

STATEMENT OF FACTS

Since Henely does not challenge either the admissibility or the sufficiency of the evidence to support his convictions, we will set forth only a brief statement of facts in order to provide context for the discussion which follows.

On November 6, 2010, the victim in this case, Charles Maitre, returned from a trip to find his house had been ransacked. A number of items had been taken, including his 1993 Buick, which had been parked in the driveway when he left for his trip. The victim had left his home on November 2 and had left keys with his neighbors, Mr. and Mrs. Henely, parents of the appellant in this case.

At around noon on November 6, Henely sold several items of property, stolen from the victim's house, to a pawn shop in Lemon Grove, in San Diego County. At about 3:00 p.m. the same day, a sheriff's deputy spotted the 1993 Buick at an intersection in

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2 The Attorney General correctly concedes that the sentence on count 3 (grand theft) should have been stayed. Accordingly we will modify the judgment to reflect that such count is stayed under section 654.

Lemon Grove. The deputy checked on the license plate and found it was for the Buick stolen from the victim. When the deputy attempted a traffic stop a high speed pursuit followed at speeds up to 110 miles per hour.

The car chase ended in La Mesa near a carwash. The driver fled from the car. With the aid of witnesses, the deputy found and apprehended Henely, who witnesses identified as the driver of the stolen Buick. At the time of his arrest Henely had a key to the Buick and the victim's credit card in his pocket.

DISCUSSION

I

HENELY'S REQUEST FOR A CONTINUANCE ON THE DATE OF TRIAL

At the time this case was ready for trial, Henely had another case pending, which was the basis for the on-bail enhancement that was pled in this case. After the trial court indicated that this case would be tried first, Henely, who wanted the other case tried before this one, had the following exchange with the court:

> "[Appellant]: I'm thinking about -- I want to do my other case first, okay. The only thing is I'm thinking about obtaining legal counsel for this case, private legal counsel for this case, but not my other case. See what I'm saying? I need a little bit of time to put money together for a retainer fee."

The court responded:

> "I can't give you any time past this to do a retainer. If you had an attorney come in and tell me he was retained on this case and needed a continuance, that would be a different issue. I can't bet . . . that you are going to come up with a retainer or might have an attorney get ready for this case. [¶] As far as scheduling the two cases, this is the one set for trial today. This is the one we are going on. So I

> guess your request to continue this case will be denied. [¶] The request to continue this case for the potential of getting someone to represent you is denied. [¶] Like I said, if you contacted an attorney and an attorney comes in and says, 'Judge, I'm handling Mr. Henely's case from this forward,' that's a different set of facts."

Henely then asked if he had an attorney show up the next day whether that would justify his request for a continuance. The court responded that it would not declare a mistrial if new counsel showed up after the trial had started. Henely continued to protest that he wanted the other pending case tried first. The court explained that given the on-bail enhancement in this case that the court was going to try this case first.

Later the same day Henely made a motion to replace appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118, and a motion to be permitted to represent himself under *Faretta v. California* (1975) 422 U.S. 806. Both motions were denied. Henely does not challenge the denial of either motion on this appeal.

The decision to grant or deny a continuance of a criminal trial is guided by section 1050, subdivision (e), which requires a showing of good cause to justify such continuance. A trial court's determination of whether good cause has been shown is reviewed for abuse of discretion. (*People v. Sakaris* (2000) 22 Cal.4th 596, 646.) A trial court's decision to deny a continuance will only be overturned where the record on appeal clearly demonstrates an abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

Henely contends the trial court's denial of his requested continuance violated his Sixth Amendment right to retained counsel of his choice. Indeed, *United States v.*

Gonzales-Lopez (2006) 548 U.S. 140, 144, recognizes that a criminal defendant, who can afford to retain counsel, has a right to counsel of his or her choice. That right is not absolute. In *Gonzales-Lopez*, the defendant had retained counsel but the trial court would not allow the attorney to practice in that court, an action the government conceded was error. The case before us is much different.

This case had been pending in the trial court for several months. Henely never raised the question of retaining counsel until the day of trial and after his request to have the other pending case tried first was denied. Even then Henely did not have an attorney in mind, did not have any money of his own and had not talked to any lawyer about undertaking representation in this case. The requested continuance was not only open-ended, but was based on speculation that he could "put the money together" or that he could obtain enough money to retain counsel. Even if those uncertainties were resolved, it was also uncertain how much time a newly retained attorney would need to be ready to try this case. A trial court has the unquestioned discretion to deny a late request to delay trial in the absence of compelling circumstances. (*People v. Courts* (1985) 37 Cal.3d 784, 792, fn. 4.)

Here the defendant was "thinking about retaining an attorney" with no other specifics available to the trial court. It is also clear from the record that Henely was adamant about having the other pending case tried first. Thus, his additional motions that day to change appointed counsel or to represent himself further support the implied finding that one purpose of the continuance request was to delay this case and permit the

other case, with appointed counsel, to go forward. Thus, a trial court could reasonably conclude this request was not really about obtaining counsel of his choice, but driven principally by a desire to delay the trial of this case.

Finally, Henely relies on *United States v. Lillie* (9th Cir. 1993) 989 F.2d 1054 (overruled on other grounds in *United States v. Garrett* (9th Cir. 1999) 179 F.3d 1143, 1145), to support his claim he was denied the chance to have counsel of his choice. *Lillie* is entirely distinguishable from the present case. In *Lillie* the defendant had retained counsel who it was represented was familiar with the case and could proceed to trial without delay. The trial court denied the requested substitution because it was late. There the Ninth Circuit recognized the authority of trial courts to deny such requests where they would unduly delay the proceedings, but found error where no such delay was likely. (*Lillie, supra,* at p 1056.) In this case no counsel had been identified, the fact of ability to retain counsel was speculative and the length of any delay was wholly unknown at that point. We are satisfied the trial court acted well within its discretion to deny Henely's late request for a continuance. There was no violation of Henely's Sixth Amendment right to counsel of his choice.

II

THE SENTENCE FOR VEHICLE THEFT IN COUNT 2

The trial court sentenced Henely to a four-year term for the burglary in count 1 and a consecutive eight-month term for count 2, unlawful taking of a vehicle. Henely contends the trial court erred in failing to stay the sentence for count 2 under section 654

and even if section 654 does not apply, the court abused its discretion by imposing a consecutive sentence. We find the trial court properly imposed a consecutive sentence on count 2.

A. Section 654

Where a single episode results in the commission of multiple crimes, the question of whether the trial court can impose separate sentences for each crime is guided by section 654. That section provides, in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides the longest potential term of imprisonment, but in no case shall the act be punished under more than one provision." (§ 654, subd. (a).) The question thus presented is whether the conduct is divisible into separate acts. The answer to that question depends on the "intent and objective of the actor." (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267.) If all of the acts were taken during the criminal episode or objective then section 654 requires that only one punishment be imposed. Whether the acts committed were driven by separate intents or objectives is a matter for the trial court to decide. On appeal the actual or implied findings of the trial court will be upheld if they are supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252-1253.)

In the present case the trial court could reasonably conclude that Henely's decision to take the car, which was parked in the driveway, was motivated by a separate intent or objective than that which was involved in the burglary of the dwelling. Henely argues

that since the keys for the car were either in the house or garage and that the car was used to transport the stolen goods, the court should have found the taking of the car was simply an extension of the underlying purpose for the burglary. Henely did not raise section 654 in the trial court. Thus the court was not called upon to address the issue. However, the fact the court not only imposed a separate sentence, but also imposed a consecutive sentence leads us to conclude there was an implied finding of the separate intent for the taking of the car. Such implied finding is supported by the record.

We do not know when the burglary took place, other than it was between November 2 and November 6. We also know the car was being driven by Henely on November 6. However, we think that from the location of the car in the driveway and the reasonable inference that Henely discovered the keys during the burglary, that his decision to steal the car was based on a separate intent, formed after the commencement of the burglary. Clearly Henely obtained the keys to the house from his parents' home, where the victim's house keys had been left in order for them to watch his house. It is reasonable to infer the car keys were later discovered, at which time Henely decided to steal the car. We are satisfied there is sufficient substantial evidence in the record to support the trial court's implied finding of a separate intent with regard to count 2.

B. Consecutive Sentence

Henely challenges the eight-month consecutive sentence imposed for count 2. He argues the trial court abused its discretion in imposing that sentence. The argument appears to be based largely on the fact the trial court failed to state reasons for its

sentencing choice. While it is true the court did not articulate the reasons for his choice, the probation report did recommend a consecutive sentence for count 2. There was no discussion of whether a consecutive sentence was appropriate prior to the court's pronouncement of sentence. No objection was made to the court's decision, thus Henely's current claim of error for failure to state reasons for the sentencing choice has been raised for the first time on appeal.

The court in *People v. Scott* (1994) 9 Cal.4th 331, 353-356, held that challenges to a sentencing choice, based on the failure to properly state reasons for the choice must first be raised in the trial court or the issue will be deemed waived on appeal. As we have noted Henely did not raise this issue in the trial court even though he was aware of the probation officer's recommendations and the prosecutor's arguments. Accordingly, we deem the issue of abuse of discretion for failing to state reasons has been waived.

To the extent Henely contends the court otherwise abused its discretion in selecting a consecutive sentence we find the argument to be without merit. The taking of the car was in addition to the activities involved in the burglary. It was used at least during the day of the burglary for various purposes including transporting the property taken in the burglary.

Trial courts have broad sentencing discretion in choosing between concurrent and consecutive sentences. (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) We review the trial court's decision for abuse of discretion. (*People v. Birmingham* (1990) 217 Cal.App.3d 180, 185-186.) Applying the abuse of discretion standard to the decision in this case, we

are satisfied the court could reasonably find the unlawful taking and driving of the car warranted additional punishment beyond that selected for the burglary. We note also the trial court imposed a sentence in this case which was less than the maximum authorized and less than those requested by either the prosecutor or the probation officer.

Thus, while it would have been better practice for the trial court to follow the rules of court and state reasons for its sentencing choice, we cannot say that the sentence actually imposed was an abuse of discretion.

DISPOSITION

The sentence imposed is modified to indicate that the sentence for count 3 is stayed pursuant to section 654. The superior court is ordered to amend the abstract of judgment accordingly and to forward an amended abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.